

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32**

(Salinas, CA)

CHILDREN'S SERVICES
INTERNATIONAL, INC.

Employer

and

Case 32-RC-4955

SERVICE EMPLOYEES
INTERNATIONAL UNION,
LOCAL 817, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 1/
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full time and regular part-time employees employed by the Employer at its Salinas, California administration office facility.

EXCLUDED: All other employees, confidential employees 2/, guards, and supervisors 3/ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election 4/ to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 817, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, 1301 Clay Street, Suite 300 N, Oakland, California 94612-5211, on or before March 21, 2002. No extension of time to file this list shall be granted except in extraordinary

circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 28, 2002.

DATED at Oakland, California, this 14th day of March, 2002.

/s/ Bruce I. Friend
Bruce I. Friend
Acting Regional Director
NLRB Region 32

1/ The parties stipulated, and I find, that the Employer is a California non-profit corporation engaged in providing childcare services at various locations in Monterey County, including facilities in Gonzalez, Greenfield, Marina, Salinas and Pajaro, California. During the past twelve months, the Employer, in the course and conduct of its business operations, received gross revenues in excess of \$250,000. During this same period, the Employer received revenues in excess of \$100,00 directly from the State of California.

2/ At the hearing, the parties stipulated to an election for a unit of employees employed at the Employer's field locations where child services are rendered. The parties were not able to reach agreement on the eligibility of certain employees in the unit at issue in this case, which is comprised of employees employed at the Employer's administration office in Salinas, California. The Employer takes the position that six

individuals in its administration office should be excluded from the unit on the basis that they are confidential employees. Petitioner asserts that they are not confidential employees and should be appropriately included in the unit.

Timothy O'Connell has been the Employer's Executive Director and highest-ranking official at its administration office since May 2001. He is the only witness who testified regarding the duties of the following individuals who the Employer asserts are confidential employees.

Ramon Diaz is an Information Systems Specialist and reports directly to Executive Director O'Connell. In this capacity, Diaz prepares reports of an unspecified nature for Executive Director O'Connell; however, there is no evidence indicating that Diaz works on documents regarding the Employer's bargaining strategy. Diaz is also responsible for establishing access to computer network databases for the employees employed at the Employer's administration office as well as for those employed at the childcare centers. As such, Diaz has access to any confidential information that may be contained in the Employer's computer system. The Employer specifically argues in its brief that Diaz has access to confidential financial and management reports, including executive salaries. The evidence does not establish that documents setting forth the Employer's bargaining strategy, or similarly confidential labor relations documents, are readily accessible to Diaz or other employees on the computer. Moreover, Diaz has no need to access any of labor relations information in order to perform the duties of his position.

Patricia Moreno is a Financial Assistant. As such, she reports to Luz Garcia, the Financial Services Administrator, who has no responsibility for formulating management

policies in the field of labor relations. Moreno is responsible for entering invoices, provider payments and payroll information into the Employer's accounting software. As such, Moreno has access to the Employer's budget and general financial information, including salary and benefits information. There is no evidence that Moreno needs to access any other documents that might arguably be considered confidential labor relations information in order to perform the duties of her position.

Olivia Renteria-Komura, is the Coordinator of Client Services and reports to the Office Manager. Renteria-Komura works as a receptionist and compiles information from clients into the centralized waiting list. According to Executive Director O'Connell, Renteria-Komura does not prepare any correspondence and has no computer access to confidential information. There is also no evidence that Renteria-Komura needs to access any confidential labor relations information in order to perform the duties of her position.

Lily Rodriguez is the Parent Fees Manager and reports to Luz Garcia, the Financial Services Administrator. Rodriguez is in charge of accounts receivable for parents' fees. In this position, she receives fees from and prepares bills for the parents. She has access to the Employer's budget and general financial information. There is no evidence that she needs to access any other arguably confidential labor relations information in order to perform the duties of her position.

Allen Tadman is a Financial Assistant and reports to Luz Garcia. Tadman handles accounts payable and works with fellow Financial Assistant Patricia Moreno on entering salary and benefit information into the computer system. Like Moreno, he has access to the Employer's budget and general financial information, including information

concerning salaries and benefits for all individuals employed by the Employer. There is no evidence that Tadman needs to access any other arguably confidential labor relations information in order to perform the duties of his position.

Vince Uyeda is an Information Systems Specialist and reports to Luz Garcia. He assists employees with software and database applications. He has access to company financial records and other documents contained in the computer system. However, Uyeda does not need to access any other arguably confidential labor relations information in order to perform the duties of his position.

Because confidential employees are excluded from collective bargaining units, the Board's test for determining whether an employee is a confidential employee is a narrow one. Moreover, the party asserting that an employee is a confidential employee has the burden of proof. *Crest Mark Packing Co.*, 283 NLRB 994 (1987). The Board will find an employee to be a confidential employee if the employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations, hereinafter called the labor nexus test. *B.F. Goodrich Co.*, 115 NLRB 772, 774 (1956); *Weyerhaeuser Co.*, 173 NLRB 1170 (1969); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). In some cases, the Board has also found employees to be confidential employees because they had regular access to confidential labor relations information, which, if prematurely disclosed to the union, would prejudice an employer's bargaining strategy in future negotiations, herein called the *Pullman* access test. *Pullman Inc.*, 214 NLRB 762 (1974); *The Bakersfield Californian*, 316 NLRB 1211 (1995). By regular access, the Board does not mean mere potential or theoretical access; rather, it means that the

employee regularly must handle, read or otherwise work with bargaining strategy materials or similar documents that would meet the *Pullman* access test. *Inland Steel Co.*, 308 NLRB 868, 873 (1992).

Here the Employer has not argued that the employees at issue in this case are confidential employees based on the traditional labor nexus test. Rather, the Employer argues that the disputed employees are confidential employees under the *Pullman* access test. However, the evidence does not establish that any of the employees at issue in this case have the type of regular access required under the *Pullman* access test. Although Diaz and Uyeda have potential access to all computer information, there is no evidence that they regularly see or regularly work with confidential labor relations information, which, if prematurely disclosed to the union, would prejudice an employer's bargaining strategy in future negotiations. Moreover, the evidence does not establish that the Employer's computers contain documents that would meet the *Pullman* access test. Thus, I conclude that they are not confidential employees. *Pullman Inc.*, above; *The Bakersfield Californian*, above.

Similarly, Moreno, Rodriguez, and Tadman have regular access to payroll records, accounts receivable, or other confidential financial information. However, such raw financial information is not considered by the Board to be the type of confidential labor relations information that would meet the *Pullman* access test. *Inland Steel Company*, above at 873. Rather, there must be some showing that the purported confidential employees regularly see or work with documents that show the terms or labor rates to which the employer would agree in a collective-bargaining agreement, or that show similarly confidential employer bargaining strategy information. *Case Corp.*,

304 NLRB 939 (1991). Thus, I conclude that Moreno, Rodriguez and Tadman are not confidential employees.

Finally, the record evidence does not appear to support the Employer's assertion in its post-hearing brief that Renteria-Komura opens the mail for Executive Director O'Connell. However, even if she did, that alone would not be enough to make her a confidential employee, The *Bakersfield Californian*, above at 1212. Moreover, there is insufficient evidence to establish that she acts or assists O'Connell in a confidential capacity or that she regularly has access to the types of confidential materials described in the *Pullman* access test. I therefore conclude that she is not a confidential employee.

The Employer's reliance on *Associated Day Care Services of Metropolitan Boston*, 269 NLRB 178 (1984) is misplaced. There, the Board found administrative assistants to be confidential employees primarily because they were expected to investigate grievances, the results of which would affect decisions made by management on the merits of the grievance. Further, these assistants, on occasion, typed memoranda concerning management's collective bargaining proposals prior to these proposals being presented to the Union, and regularly saw minutes from management meetings at which bargaining proposals would be discussed. Thus, as part of their regular duties these employees worked with the types of confidential labor relations materials that meet the *Pullman* access test. As noted above, in the instant case, there is no record evidence of such duties being performed by any of the disputed employees.

Accordingly, the Employer has failed to meet its burden of establishing that any of the six employees should be excluded from the unit as confidential employees. Thus,

Ramon Diaz, Patricia Moreno, Olivia Renteria-Komura, Lily Rodriguez, Allen Tadman and Vince Uyeda are properly included in the collective bargaining unit.

3/ The parties stipulated that the following individuals should be excluded from the unit as managers or supervisors and/or confidential employees: Timothy O'Connell, Larry Coppetelli; Minnie Corda; Rosemarie Marquez; Roni O'Connell; Luz Garcia; and Mary Sanchez. These seven individuals are therefore excluded from the unit.

The Employer would also exclude five individuals, Sylvia Alderete, Pat Diaz, Rebecca Martinez, Anthony Melendrez, and Aurora Urzua, from the unit on the basis that they are supervisors within the meaning of the Act. Petitioner takes the position that the Employer has failed to sustain its burden of proving that any of them is a supervisor.

Pat Diaz is the Coordinator of Provider Payout, and her immediate supervisor is Office Manager Mary Sanchez, who is stipulated to be a statutory supervisor. Besides Diaz, there are six other staff members in this department. Diaz spends most of her time performing the same type of work as the other members in this department. Diaz testified that it is her responsibility to ensure that the work performed by the employees in this department is accurate, that deadlines are met, and that contracts and checks are mailed out on time.

Diaz has been present at interviews with job applicants, including the interviews of each of the six employees employed in her department. Two of these interviews apparently occurred within the past seven months. According to Diaz, other coordinators were present at each of her interviews, and Executive Director Timothy O'Connell was also present on at least one of those occasions. According to O'Connell,

it appears that Rosemarie Marquez, the Human Relations Coordinator, may have also been present at Diaz's more recent interviews. Although there is evidence that Diaz's supervisor, Mary Sanchez, attended some applicant interviews, it is unclear whether Sanchez attended any of the interviews in which Diaz participated.

After each of the applicant interviews, Diaz gave Executive Director O'Connell her recommendations regarding whether or not to hire the applicants. O'Connell testified that he could not recall a time when he did not follow her recommendation; although, he did not make it clear that, when making the hiring decisions, he had relied solely or even primarily on Diaz's recommendations. O'Connell also testified that, on some occasions, he and Human Relations Coordinator Marquez have met with the applicants after their interview; although it is not clear whether he met with the applicants interviewed by Diaz. O'Connell also testified that he gets the input of the coordinator of the department that is doing the hiring, discusses the hiring decision with Marquez and then makes the final decisions regarding hiring himself.

Diaz testified that she has orally disciplined employees in her department by taking them into the office and giving them an oral explanation of problems with their work or attendance or tardiness. There are no details in the record as to how often Diaz has done this, and Diaz testified that before taking any disciplinary action, she would generally seek guidance from either Executive Director O'Connell or from her supervisor, Mary Sanchez. There is also no evidence regarding whether these oral disciplinary actions were recorded in the employees' personnel files or whether these warnings could be relied upon in deciding future disciplinary actions these employees. Diaz also recalled issuing one written warning to an employee, and believes that took

place about a year ago. Prior to issuing the warning, Diaz discussed the matter with O'Connell.

According to O'Connell, Diaz issued two written warnings to employees, both within about the last year. On both occasions, prior to actually giving the warning to the employee, Diaz spoke with O'Connell in detail about the employee misconduct, her prior communications with the employees about their conduct, and the propriety of giving the warning.

Diaz also testified to having completed annual evaluations for three employees, one of which resulted in an automatic wage increase. Diaz turned the evaluation into her supervisor, Mary Sanchez, after completing it but did not know whether Sanchez independently reviewed the evaluation or not. Diaz testified that on one occasion, which did not involve an employee evaluation or a group raise, she recommended to Executive Director O'Connell that an employee be granted a raise, and that O'Connell agreed. O'Connell testified that Diaz had also made several other recommendations that employees in her department receive raises. O'Connell could recall only one or two other occasions where he had approved Diaz's recommendation, although he indicated that financial concerns were the reason he did not approve her other recommendations. He also indicated that some of Diaz's other recommendations for raises were, in effect, granted when the Employer instituted its new pay raise system for newly hired employees.

Diaz testified that on one occasion she recommended to Executive Director O'Connell that he create a new position and promote employee Sonia Rodriguez into that position. According to Diaz, O'Connell approved her recommendation, and

Rodriguez received a \$1.25 per hour raise as part of the promotion. O'Connell did not testify about this specific promotion; rather, he merely stated that Diaz has the authority to recommend that employees be promoted. According to Diaz and O'Connell, Diaz also recommended that O'Connell approve the transfer of Sonia Rodriguez, and he did so.

Employees in the provider payout department are each assigned to work on a portion of the alphabet and the work is automatically routed to them on this basis. Diaz advises them of deadlines, which are based on which days certain dates of the month fall, for processing, mailing, etc. On occasion, Diaz assists employees who have fallen behind in their work by having someone who has completed their assignment help out the person who is falling behind. Finally, Diaz testified she also has the authority to deny requests for time off but not to approve them. She has denied such a request on one occasion.

Rebecca Martinez was called to testify by Petitioner. She has been the Family Services Coordinator since October 1998, and in that capacity she directs the work of about three employees. Her immediate supervisor is Office manager, Mary Sanchez. Martinez testified she has never disciplined or even recommended that an employee be disciplined, nor has she ever been told that she has the authority to do so. According to Martinez, no one has ever discussed her authority in this regard with her. She has been present, along with Sanchez and Human Resources Director Marquez, at 5 or 6 interviews with job applicants. Executive Director O'Connell testified that Urzua has the authority to participate in applicant interviews and to make recommendations regarding

whether or not the employee should be hired. Martinez testified that she has not made any recommendations as to who should be hired or interviewed.

Within the past month, an employee was transferred from Family Services Department to the Payout Department. Although O'Connell provided hearsay evidence that Martinez had been consulted about the transfer, Martinez testified that she only learned of the transfer after it had occurred. In the Family Services Department, employees have designated caseloads and perform certain tasks that are repeated on a monthly basis. Martinez testified that she has no authority to transfer work from one employee to another. If an employee is absent, Martinez will perform that employee's work.

Martinez testified that she has signed about six employee evaluations since she became the department coordinator, and that employees receive pay raises based on the numerical scores of their evaluations. Martinez testified it has been standard practice that all of the employees in the department complete their own evaluations, including the numerical scores. For example, Martinez was asked to sign an annual evaluation for employee Saro. Consistent with her normal practice, Martinez only signed the evaluation after Saro had already completed the form and self-assigned the numerical ratings for each category. After Martinez signed it and gave it to her supervisor, Mary Sanchez, one of the ratings was changed, however, Martinez was not consulted about the change. O'Connell provided hearsay evidence that Martinez had initially changed the employee's rating on that category and that Mary Sanchez had consulted with Martinez regarding the change O'Connell ultimately made to the rating. The Union later stipulated that Mary Sanchez, if called to testify, would testify consistent

with O'Connell's testimony on this point, and would testify that she had instructed each of the coordinators regarding the proper mechanism for completing the evaluations and that they were to go over the evaluation with the employee and then review the evaluation.

Aurora Urzua also was called to testify by Petitioner. She has been employed for 21 years and has been Coordinator of Provider Services for 3 to 4 years, and she has been supervised by Mary Sanchez. There is only one other employee in provider services, Griselda Palafox. Urzua testified that she does not have authority to discipline other employees, nor has she ever recommended discipline. In its brief, the Employer states that Urzua reprimanded an employee for wearing inappropriate attire. The evidence shows that Urzua mentioned the matter to Mary Sanchez, told the employee about the attire issue and told the employee that she would probably be called into the office. The employee was apparently called into the office, but there is no evidence that Urzua was present during this meeting; there is no evidence regarding what discipline, if any, was given to the employee; and there is no evidence regarding Urzua recommending that the employee be disciplined.

Although Urzua has attended employment interviews on several occasions, she testified that she has never made any recommendations to hire or not hire an applicant. Executive Director O'Connell recalled that, before he became Executive Director in May of last year, he had supervised Urzua, and that the two of them had interviewed an applicant. O'Connell states that on that occasion Urzua informed him that she wanted the applicant to be hired. O'Connell did not state who made the hiring decision in that

instance and did not state whether Urzua's recommendation played any role in the final decision to hire the applicant.

In March 2001, Urzua recommended to the former executive director that she and Palafox both receive raises. Sometime months later, Urzua repeatedly reminded her supervisor, Sanchez, about the request and asked her to follow up on it. Finally, in September 2001, O'Connell promoted Palafox to another position and granted her a raise.

Urzua testified that she has never completed an annual evaluation for another employee, only for herself. Urzua has signed off on evaluations for Palafox. In each instance, Palafox had already completed it and assigned the numerical ratings on her own. Urzua testified that she signed the evaluation after determining that there was nothing out of the ordinary. Urzua also testified that initially she may have looked at some individual scores, however, since that time she only has checked to make sure that the overall score is not unreasonable. I note that the significance of the overall score is that a score of 75 or more automatically means that the employee will receive a 25 cents an hour pay increase. The record does not indicate how many, if any employees, did not receive a score of 75 or more. Urzua does recall one of Palafox's evaluations where Palafox raised a tardiness problem. Urzua could not recall how Palafox ended up receiving a rating of two on that portion of the evaluation, but recalls that Palafox had prepared the overall evaluation and that Palafox was the one who decided to include an explanation in the evaluation regarding why she had been tardy. Urzua did add comments at the end of one evaluation, noting that Palafox had improved

during the year in attendance and performance. Urzua indicated that she did so on her own initiative, because Palafox's morale was quite low at that time.

Executive Director O'Connell was the only witness to testify concerning Sylvia Alderete and Anthony Melendrez. The evidence does not establish that O'Connell was Alderete's or Melendrez's immediate supervisor, and there is no evidence regarding what Alderete or Melendrez were told by the Employer regarding the scope of their authority.

O'Connell testified that Alderete is the Family Services Coordinator. There are six other employees in that department, which is responsible for ensuring that all centers are enrolled to their maximum capacity based on their staffing levels, and which informs enrolled families of their rights and obligations and responds to the concerns of the providers and enrolled families. According to O'Connell, Alderete coordinates and monitors the work in the department; sits in on interviews; makes recommendations as to hiring; has authority to prepare annual evaluations and "disciplinary statements" for employees; can recommend raises for employees; can permit employees to take a day off or somewhat modify their work hours; can resolve employee disputes regarding competing vacation requests; has the authority to act on employee complaints; and has the authority to determine how operations in the department should run. O'Connell believes Alderete issued one written warning; however, this occurred prior to May 2001 when O'Connell became the Executive Director. O'Connell did not establish that he had first hand information that Alderete had issued the warning, whether it was issued on her own authority or any other circumstances concerning the purported written warning.

According to O'Connell, Alderete has participated in employment interviews on two occasions in the past 6 months. O'Connell did not participate in those interviews, but did meet with the applicants and Rosemary Marquez after the interview. O'Connell also testified that he sought Alderete's input regarding the applicants and met with Marquez regarding whether or not to hire the applicants. There is no evidence regarding the nature of Alderete's input, or regarding what weight O'Connell gave Alderete's input verses Marquez's input and verses his own independent evaluation of the applicants.

O'Connell also testified that Alderete could recommend pay increases for employees and that she had made numerous recommendations that employees in her department receive raises. O'Connell identified one employee who had received two raises based on Alderete's recommendation. However, one of those raise was part of an overall pay raise system restructuring. O'Connell did not explain whether he had made an independent assessment of the pay raise proposals and did not explain why he did not approve Alderete's other pay raise recommendations. Other than the foregoing, O'Connell did not testify to any other details regarding Alderete's authority, duties, actions or responsibilities. Moreover, the written warning and the annual evaluations purportedly prepared by Alderete were not introduced into evidence.

Anthony Melendrez, who is no longer employed by the Employer, was the Coordinator of Center Based Maintenance and directed a crew of five people who perform maintenance work at the Employer's child care centers and the administrative office. O'Connell testified that Melendrez had the authority to interview job applicants and the authority to make recommendations as to which applicants should be hired.

O'Connell also testified that Melendrez gave input as to which locations employees should be assigned; had the authority to transfer them among the Employer's facilities, depending on the staffing level and projects that needed to be done on a daily basis; had the authority to issue oral or written reprimands; evaluated employees; and had the authority to make recommendations as to wage increases, promotions and job changes. Finally, O'Connell testified that Melendrez had the authority to resolve employee complaints, or to come to O'Connell and make recommendations.

However, O'Connell provided no examples or details of Melendrez's purported authority, and did not describe the extent of Melendrez's discretion in carrying out his duties. O'Connell admitted that he had no knowledge of whether Melendrez had ever issued any disciplinary warnings. O'Connell testified that he heard that Melendrez was to participate in two employee interviews, along with Rosemary Marquez and at least one other person. Although O'Connell states that he assumed that Melendrez's recommendation to hire or not hire an applicant would carry considerable weight, he had no further evidence regarding Melendrez's role, if any, at the interview or in the decisions to hire or not hire any applicants.

The evidence reflects that all employees, including admitted managers and supervisors, are subject to the same benefits and vacation accrual. All of the coordinators at issue are hourly paid and are required to record their daily hours of work. The coordinators' wage rates range from \$13.50 for Melendrez to \$17.00 for Alderete. Regular employees of the Employer typically receive \$7.00 per hour when first hired. With regard to the employee wages that were placed in evidence, the range was from \$8.00-\$12.50 per hour.

In, *Kentucky River Community Care v. NLRB*, 532 U.S. 706, 121 S.Ct. 1861 (2001), the Court stated that Section 2(11) of the Act: ... "sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'In the interest of the employer.' *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994). The Court also noted in *Kentucky River* that, "[m]any nominally supervisory functions may be performed without the 'exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act." *Kentucky River*, above, at 1867, citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949). Therefore, it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. See also *Dynamic Science, Inc.*, 334 NLRB No. 57, slip op. at 1 (2001) Finally, the Court in *Kentucky River* also upheld the Board's rule that the burden of proving supervisory status rests with the party asserting it. *Kentucky River*, above at 1866-67.

Based on the record evidence in this case, I cannot conclude that Rebecca Martinez or Aurora Urzua possess any of the requisite indicia to find that they are supervisors within the meaning of the Act. Although Executive Director O'Connell provided some conclusory testimony regarding the authority he believed Martinez and Urzua possessed, O'Connell was not their direct supervisor and did not provide any examples demonstrating that he had any first hand knowledge of their authority. There

is also no evidence establishing what degree of independent judgment, if any, Martinez and Urzua exercise in carrying out their duties, nor is there sufficient specific evidence to establish that either of Martinez or Urzua had the authority to effectively recommend personnel actions of the type listed in Section 2(11) of the Act. Finally, there is no evidence regarding what the Employer told Martinez and Urzua regarding their authority.

The evidence establishes that neither Martinez nor Urzua have the authority to hire, fire or suspend employees. Although they were involved in employment interviews, Martinez and Urzua testified that they have never even offered opinions on prospective hires. Martinez and Urzua have never issued any type of discipline and were unaware of having any authority in this regard.

Even though Martinez and Urzua have signed employee evaluations, they both testified that they did so only after the individual employees had filled out the evaluations, including the numerical scores. Similarly, the evidence does not show that Martinez or Urzua exercised any significant discretion or independent judgment in assigning or distributing work. Rather, they appear to function more as lead persons in their respective areas in order to ensure that the work is performed in a smooth and efficient manner. Based on the record as a whole, I find that Rebecca Martinez and Aurora Urzua are not supervisors within the meaning of the Act and, therefore, are eligible to vote in the election.

On the other hand, Pat Diaz Executive Director O'Connell testified that she has actually exercised authority in several of the areas that are set forth in Section 2(11) of the Act as supervisory functions. Diaz participated in each of the interviews for the

employees currently working in her department. Unlike Martinez and Urzua, Diaz made recommendations to O'Connell after each interview. Although O'Connell made the ultimate hiring decision, he testified that he could not recall a time when he did not follow Diaz's recommendation. Therefore, the evidence supports a finding that Diaz possessed and exercised the authority to effectively recommend the hiring of at least six individuals. Diaz also testified to having exercised her authority to issue warnings to employees, both verbally and in writing. Although she may have discussed the matter with O'Connell first, he did not perform any independent investigation to ensure that the discipline was warranted. On one occasion, Diaz also effectively recommended the transfer of an employee to another department inasmuch as O'Connell approved the transfer apparently based only on the recommendation.

Finally, Diaz testified that, unlike Martinez and Urzua, she prepared annual evaluations for employees in her department on at least three occasions. One of the evaluations resulted in a wage increase for the employee. On another occasion, O'Connell agreed with Diaz that another employee should be given a raise, again apparently based on Diaz's recommendation. In yet another situation, Diaz's recommendation was followed regarding the creation of a new position and the promotion of a particular employee into the newly created position.

Thus, the record evidence supports a finding that Pat Diaz is a supervisor within the meaning of the Act. Diaz possesses and has exercised the authority to issue verbal and written discipline; to effectively recommend the hire of new employees; to evaluate employees, thereby affecting their wages; and to effectively recommend wage

increases, promotions and transfers, all of which are indicia of supervisory status.

Accordingly, Pat Diaz will be excluded from the unit on this basis.

The record evidence regarding Sylvia Alderete and Anthony Melendrez is not sufficient to determine whether they are supervisors within the meaning of the Act. O'Connell, who is not the immediate supervisor of Alderete or Melendrez, testified in conclusionary terms that they possess a few indicia that might indicate supervisory status. O'Connell did not provide sufficient details regarding the extent and exercise of their authority, and he did not provide examples of their exercise of authority. There is also insufficient evidence to establish the degree to which Alderete and Melendrez exercised independent judgment in the exercise of their authority; or whether any of their recommendations were, in fact, relied on by the Employer in making personnel decisions. Furthermore, the Employer did not offer any supporting documentation into evidence and did not provide any evidence regarding what Alderete and Melendrez had been told by the Employer regarding the scope of their authority. As I cannot make a determination of their status based on the record evidence, Alderete and Melendrez will be permitted to vote subject to challenge

There are approximately 31 employees in the petitioned-for unit.

4/ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

177-8560-1500

177-2401-6800

